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20 REED, and COASTAL PROTECTION
RANGERS, INC.
21

22 **UNITED STATES DISTRICT COURT**

23 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

24 CORY SPENCER, an individual;
25 DIANA MILENA REED, an
individual; and COASTAL
26 PROTECTION RANGERS, INC., a
27 California non-profit public benefit
corporation,
28

CASE NO. 2:16-cv-02129-SJO (RAOx)

**PLAINTIFFS' REPLY IN SUPPORT
OF ITS MOTION FOR SANCTIONS
AGAINST THE CITY OF PALOS
VERDES ESTATES**

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Plaintiffs,

v.

LUNADA BAY BOYS; THE
INDIVIDUAL MEMBERS OF THE
LUNADA BAY BOYS, including but
not limited to SANG LEE, BRANT
BLAKEMAN, ALAN JOHNSTON
AKA JALIAN JOHNSTON,
MICHAEL RAE PAPAYANS,
ANGELO FERRARA, FRANK
FERRARA, CHARLIE FERRARA,
and N. F.; CITY OF PALOS VERDES
ESTATES; CHIEF OF POLICE JEFF
KEPLEY, in his representative
capacity; and DOES 1-10,

Defendants.

Judge: Hon. Rozella A. Oliver
Date: December 6, 2017
Time: 1:30 p.m.
Crtrm.: F

Complaint Filed: March 29, 2016
Trial Date: December 12, 2017

1 I. INTRODUCTION

2 Under Rule 37(e), if ESI is lost because a party “failed to take reasonable
3 steps to preserve it,” the Court may issue an order to “cure the prejudice.” The City
4 admits that evidence was lost and cannot be restored from its DPP Phone. Moreover,
5 the City failed to take reasonable steps to preserve the DPP Phone because it took
6 *no steps* to preserve the DPP Phone at the outset of this case. Finally, the admitted
7 loss of texts between Blakeman and other Bay Boys has prejudiced Plaintiffs in their
8 claim against the City—Plaintiffs must prove the Bay Boys’ illegal localism in
9 addition to the City’s custom and practice of complicity in the Bay Boys’ conduct.

10 II. THE CITY FAILED TO TAKE REASONABLE STEPS TO 11 PRESERVE THE DPP PHONE.

12 A. The City had possession, custody, or control of its DPP phone 13 throughout this litigation.

14 The City first argues that it did not have possession of its DPP Phone. *See*
15 Opposition, at p. 9, n. 4. But under *In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th
16 Cir. 1999), possession, custody, or control is satisfied where the party has the “legal
17 right to obtain documents upon demand.” Here, the City owns the DPP Phone and
18 pays for its service. Further, the City testified that when it “learned” of the DPP
19 Phone’s use, it was able to recover the phone promptly, further demonstrating its
20 “possession, custody, or control.” *See* Opposition at 3:19, 4:13-15.

21 Notwithstanding the City’s claimed negligence, it had the legal right (and
22 obligation) to obtain and preserve its DPP Phone at the outset of this litigation.

23 B. The City and its attorneys made no effort to preserve any of its 24 DPP Phones upon the filing of the lawsuit.

25 The City argues that it had no knowledge that Blakeman possessed the DPP
26 phone at the time this lawsuit was filed, and therefore it was absolved of preserving
27 data on the phone. But the City must preserve both evidence that it knows of and
28 *should have known of* that is relevant to a claim or defense. *See Compass Bank v.*

1 *Morris Cerullo World Evangelism*, 104 F.Supp.3d 1040, 1051 (S.D. Cal. 2015). It
 2 must make a reasonable inquiry into identifying sources of relevant ESI. The City
 3 provides no evidence of the steps it took to identify any sources of ESI, and it fails
 4 to explain whether it considered the DDP Phones and, if not, why it didn't.

5 The City should have identified the DDP Phone that Blakeman possessed.
 6 First, the City disperses the DDP Phones among its citizens to protect the
 7 community. Given the pervasive community-supported localism, it is reasonable
 8 that a DDP phone may contain relevant evidence. Second, the DDP Phones are to be
 9 used only in emergency situations, and none occurred during the relevant time. *See*
 10 Dkt No. 508-13, at 4:3-8, 5:11-17. Had the City reviewed the DDP Phones' usage at
 11 the outset of this case, as it did in January 2017 when it performed an "audit of its
 12 phone bills," it would have noticed that a single phone had "excessive activity." *See*
 13 Opposition, at p. 3:19-20. The City's failure to conduct *any inquiry* into the DDP
 14 Phones, much less a reasonable inquiry, allowed Blakeman to possess the DDP
 15 Phone—and delete relevant texts—during the first eight months of this case.¹

16 **C. Counsel for the City learned that Blakeman possessed a DDP**
 17 **Phone at his deposition but failed to preserve it.**

18 Counsel for the City admits it learned that Blakeman possessed a DDP Phone
 19 during his deposition on November 21, 2016. City defense counsel also learned that
 20 Blakeman texted and received texts on the DDP Phone. But City counsel apparently
 21 *never* informed the City of these facts. "Counsel bear responsibility for coordinating
 22 their client's discovery production." *Knickerbocker v. Corinthian Colleges*, 298
 23 F.R.D. 670, 678 (W.D. Wash. 2014). "Counsel must take affirmative steps to
 24 _____

25 ¹ The City claims that through its insurance pool CalJPIA it paid its ESI vendor
 26 \$250,000. Spending money is not probative of competence in ESI management, and
 27 here, may be due to the City hiding the ball, failing to collaborate with Plaintiffs in
 28 identifying custodians, or mismanaging its ESI vendor.

1 monitor compliance so that all sources of discoverable information are identified
 2 and searched.” *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D. N.Y.
 3 2004); *see also R & R Sails Inc. v. Ins. Co. of State of Pa.*, 251 F.R.D. 520, 528
 4 (S.D. Cal. 2008) (sanctions for “failure to search for and timely produce” ESI). City
 5 counsel failed to take any action after learning of the DDP Phone in Blakeman’s
 6 possession and allowed him nearly two additional months to delete relevant texts.

7 The City argues that because Blakeman testified that there were no responsive
 8 texts, it had no duty to preserve evidence on the DDP Phone. *See, e.g.*, Opposition at
 9 p. 4, n. 2. No authority, however, allows an attorney to rely on the word of a witness
 10 asserting that his device possesses no discoverable information and make no further
 11 inquiry. Indeed, this is the antithesis of “affirmative steps” required by *Zubulake*.

12 **III. PLAINTIFFS HAVE BEEN PREJUDICED BY THE LOSS OF DATA.**

13 **A. The City concedes it failed to preserve ESI on the DPP phone.**

14 The City admits that responsive data from the DDP Phone was lost, but it
 15 attempts to minimize this by noting some lost texts were recovered from Papayans’
 16 phone, and only four known texts were lost. But the Court can presume that further
 17 relevant texts between Blakeman and other Bay Boys were sent and later deleted:

18 OS argues an adverse jury instruction is not warranted, in part because
 19 ‘HM merely speculates that there would be documents relevant to the
 20 alleged trade dress.’ The court disagrees, given the relevant documents
 21 that were eventually recovered from a later period and other sources.
 22 *See In re Napster, Inc.*, 462 F. Supp. 2d at 1077 n.5 (the content of
 23 emails recovered from other sources is probative of the contents of lost
 24 emails)

25 *Blumenthal Distributing, Inc. v. Herman Miller, Inc.*, 2016 WL 6609208, at *24
 26 (C.D. Cal. 2016). Accordingly, the recovery of some texts from Papayans’ phone is
 27 probative of further lost relevant texts from the DDP Phone that will never be
 28 recovered. Plaintiffs’ prejudice is not limited to those four lost texts.

29 **B. Plaintiffs were prejudiced in their claim against the City.**

30 Plaintiffs contend that the City’s custom and practice of excluding non-locals

1 works by allowing the Bay Boys to intimidate, threaten, and attack non-locals with
 2 impunity. Plaintiffs are prejudiced in their case *against the City* by the loss of
 3 evidence of the Bay Boys coordinating their illegal localism, and *the City benefits*
 4 by the loss of such evidence. In sum, a loss of evidence of the Bay Boys practicing
 5 localism is also a loss of evidence of the City's custom, practice, and complicity in
 6 allowing the Bay Boys' conduct.

7 **C. Plaintiffs diligently pursued discovery, and the destruction of**
 8 **evidence likely occurred before Plaintiffs even knew of the texts on**
 9 **the DDP Phone.**

10 The City argues that Plaintiffs lacked diligence in discovering the lost texts
 11 and caused their own prejudice. The relevant texts had been lost, however, before
 12 Plaintiffs even knew of them. The City argues that the evidence had been deleted
 13 before it took possession of the phone in January 2017. The first hint that Plaintiffs
 14 had of Blakeman's untruths was on May 5, 2017, when they received Sang Lee's
 15 cell phone invoice (though Blakeman still had not provided his correct cell phone
 16 number to Plaintiffs at this time). *See* Wolff Decl., Dkt. No. 508-4, at ¶13. Further,
 17 the City's expert testified that deleted texts on the DDP Phone are unrecoverable.
 18 *See* Wong Decl., Dkt. No. 524-5, at ¶ 6.² Blakeman's texts were lost more than five
 19 months before Plaintiffs learned of his texts to other Bay Boys, and so Plaintiffs
 20 could have done *nothing* to mitigate Blakeman's spoliation of evidence.

21 In any event, the City grossly misstates the record in an attempt to impart
 22 early knowledge of Blakeman's spoliation to Plaintiffs. The City argues that
 23 Plaintiffs knew of the DDP Phone based on Blakeman's deposition testimony, but
 24 "made no effort to request data from it until May 25, 2017." *See* Opposition, at 5:18-
 25 19. Not so. Plaintiffs served RFPs on Defendants in Fall 2016, and Defendants were

26 ² Upon further analysis, Plaintiffs understand that in the particular model of the DPP
 27 Phone, deleted texts are likely lost forever immediately. Mr. Kellerman's testimony
 28 remains accurate for the large majority of computer memory devices.

1 obligated to produce responsive information from the DDP Phone—not spoliage
 2 evidence and provide the untruthful responses upon which Plaintiffs relied.³

3 At the June 5, 2017 meet and confer between the City and Plaintiffs [*see*
 4 Opposition, at 5:25-6:12], the City contends that Plaintiffs failed to request further
 5 information off the DDP Phone. But the City represented during that call that they
 6 had produced all relevant documents, that there were no responsive texts, and that
 7 they did not believe Blakeman had deleted any texts. Again Plaintiffs relied on the
 8 City’s representations. The City next contends that Plaintiffs should have been
 9 aware of deleted texts based on billing records produced on June 22, 2017. *See*
 10 Opposition, at 6:23-7:7. But those records only show *telephone calls*, not *text*
 11 *messages*. The City obfuscates by using the word “communications,” and the City
 12 had previously represented that they believed no deletions occurred.

13 **IV. THE CITY IS NOT ENTITLED TO ITS ATTORNEY FEES.**

14 The City wrongly contends it is entitled to its fees under Rule 37(a)(5)(B).
 15 Rule 37(a) is directed to a motion to compel, not a sanctions motion under Rule
 16 37(e). Rule 37(a)(5)(B) does not apply. Further, Judge Otero held that there was
 17 “good cause” to bring this motion. *See* Order, Dkt. No. 520 (Nov. 13, 2017).

18 **V. CONCLUSION**

19 The Court should grant this Motion and deny summary judgment for the City.

20 DATED: December 4, 2017

HANSON BRIDGETT LLP

21 By: /s/ Russell C. Petersen

22 RUSSELL C. PETERSEN

23 Attorneys for Plaintiffs

24 _____
 25 ³ The City argues that it was entitled to rely on Blakeman’s deposition testimony,
 26 but that Plaintiffs lacked diligence for doing same. To the contrary, the party
 27 controlling the evidence must preserve and produce it, but a party cannot challenge
 28 potentially untruthful evidence when it has no basis for doing so.